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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

L.A. FOODS, LLC, et al., Plaintiffs and Respondents, v. INDEL FOOD PRODUCTS, INC., et al., Defendants and Appellants.	B167655 (Los Angeles County Super. Ct. No. BC 254 249)

APPEAL from the judgment of the Superior Court of Los Angeles County. Edward A. Ferns, Judge. Affirmed.

Law Offices of Thomas A. Stewart and Thomas A. Stewart; Esner & Chang, Stuart B. Esner and Andrew N. Chang for Defendants and Appellants.

Loeb & Loeb, Alan Wilken and David C. Nelson for Plaintiffs and Respondents.

Indel Food Products, Inc., and Gustavo Deandar appeal from the judgment for breach of contract entered in favor of L.A. Foods, LLC, and The Food Connection, Inc. We affirm.

FACTS AND PROCEDURAL BACKGROUND

The Food Connection, Inc., sold jalapeno peppers to Subway, the national restaurant chain. In January 1999, Subway asked The Food Connection if it wanted to supply Subway with banana pepper rings and more jalapenos. Apparently because The Food Connection could not itself meet Subway's increased needs, The Food Connection asked L.A. Foods whether it could recommend a supplier. L.A. Foods recommended appellant Indel Food Products, Inc., a packager, seller, and distributor of peppers and related foods. L.A. Foods offered to introduce The Food Connection to Indel and its owner, appellant Gustavo Deandar.

After the initial introductions and negotiations, Indel agreed to supply peppers to L.A. Foods for resale to Subway. In April 1999, the parties sealed their relationship with a non-circumvention agreement in which Indel promised to pay commissions to both L.A. Foods and The Food Connection on the peppers sold to Subway.

Shortly thereafter, Subway insisted that instead of using L.A. Foods and The Food Connection as middlemen, Indel must sell its peppers directly to it. In July 1999, Subway and Indel entered into a Supply Agreement to provide the peppers. Under the Supply Agreement, Subway could terminate the agreement upon 60 days' notice and an opportunity to cure if (a) Indel's peppers failed to meet Subway's product specifications, or (b) if Indel lost its status as an approved Subway supplier, or (c) failed to deliver its peppers on time. Despite the Supply Agreement's cutting L.A. Foods and The Food Connection out of the supply chain, Indel agreed to continue paying them their commissions under the non-circumvention agreement.

Beginning in July 1999, Indel began shipping to Subway thousands of cases of banana peppers in one gallon glass jars, and smaller quantities of pepperocinis and

jalapenos. Subway immediately began complaining about late deliveries and poor product quality. In addition, Indel quarreled with L.A. Foods and The Food Connection about the amount of commissions owed to them.

L.A. Foods and The Food Connection sued Indel and Subway over unpaid commissions. In January 2000, the lawsuit over the commissions settled. As part of the settlement agreement, Indel made two promises to L.A. Foods and The Food Connection that later became important: First, Indel promised to "make all capital improvements necessary to avoid termination of the Supply Agreement," which included buying or leasing packaging equipment needed to meet Subway's product specifications. Second, Indel promised to "use its good faith best efforts to perform under the Supply Agreement" with Subway.

Despite its renewed commitment to perform to Subway's satisfaction, Indel continued to receive complaints from Subway about the quality of the peppers and leaking containers. Although Indel asserted the complaints were less frequent than before the settlement agreement, it knew its performance must improve. To that end, Indel spent $180,000 on a new packing machine for a pilot program to ship peppers in plastic pouches. This expenditure did nothing, however, to prevent leaks in glass jars, which was Subway's principal complaint. Hoping to stop the leaks in the glass containers, Indel installed on its glass sealing machine an $800 "chuck" or "capper" it had retrieved from its parts department to tighten the lids on the jars. But one piece of equipment Indel did not buy, although it knew of its availability, was a vacuum detector, which would have reliably detected all jars that were not vacuum sealed, thereby saving Indel from shipping any that leaked. In addition, Indel refused to use "pop up" lids, which indicate with a depressed button whether a lid has formed a vacuum seal. Finally, Indel declined to apply a foolproof, low-tech solution to leaks: turning the containers upside-down or on their side to wait for any leaks to spring out. In addition to leaking glass jars, many of Indel's deliveries to almost half of Subway's 55 distribution centers continued to be late.

The Southern California Food Council represented more than 800 Subway stores. In October 2000, it asked Subway to terminate Indel as a supplier. Subway thereafter notified Indel it would no longer accept Indel's products because many of the containers leaked and some were contaminated with foreign objects. Based on Subway's decision, Indel lost its status as an approved Subway supplier. Subway followed its decision with a written notice of pending termination of the Supply Agreement, citing as grounds for termination Indel's having lost its approved supplier status, its failure to meet Subway product specifications, and its late deliveries.

After receiving notice of its pending termination, Indel attempted to cure its breach of the Supply Agreement. For example, it bought a vacuum detector. In addition, it modified the equipment used to package pepperoncinis and jalapenos. Nevertheless, containers continued to leak. At the end of the 60-day cure period, Subway cancelled the Supply Agreement because Indel had not regained its status as an approved Subway supplier.

L.A. Foods and The Food Connection then sued Indel and Deandar for breach of the Settlement Agreement.[1] After a bench trial, the court entered judgment for L.A. Foods and The Food Connection. It ordered Indel and Deandar to pay L.A. Foods almost $200,000 (minus an $86,000 set-off for unpaid goods; see fn. 1, *ante*) and The Food Connection almost $200,000 also. Additionally, it ordered them to pay L.A. Foods and The Food Connection $175,000 in attorneys fees and over $13,000 in costs. This appeal followed.

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[1] In addition, Indel cross-complained against L.A. Foods for unpaid deliveries of products. The court entered judgment for Indel on its cross-complaint and offset its judgment for L.A. Foods by the amount of the cross-judgment. Neither party appeals from the cross-judgment and thus we need not discuss it further.

DISCUSSION

Substantial Evidence of Causation

Indel and Deandar contend there was no evidence of causation to support the breach of contract judgment against them. They note Subway was entitled to terminate the Supply Agreement if (1) Indel's products did not conform to Subway's specifications, (2) Indel's deliveries were late, or (3) Indel lost its status as an approved Subway supplier. For the Settlement Agreement with L.A. Foods and The Food Connection, on the other hand, Indel and Deander breached it (for our purposes here) only if Subway terminated the Supply Agreement because Indel failed to make "necessary capital improvements" or use its "best efforts."

Indel contends Subway's letters announcing Subway's decision to terminate the Supply Agreement unless Indel cured its performance within 60 days were the only evidence of Subway's reasons for terminating the Supply Agreement. Subway's two letters--one dated October 13, 2000, giving notice of Subway's intention to terminate, and one dated January 26, 2001, terminating the agreement--refer only to Indel's loss of approved supplier status, product nonconformance, and late deliveries. Based on these letters, Indel argued there was no evidence Subway canceled the Supply Agreement based on Indel's purported lack of best efforts or failure to make necessary capital improvements.[2] To the contrary, Indel urges, Indel could have been using its best efforts

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[2] Indel misconstrues the thrust of Subway's notice-to-cure and termination letters by failing to read between the lines of Subway's correspondence, particularly Subway's second letter which terminated the Supply Agreement. Subway's first letter, which gave Indel 60 days to cure, identified three problems: product nonconformance, late deliveries, and loss of approved supplier status. Indel resisted Subway's characterization of its products and performance as substandard, but hedged its position by promising to cure any defects that might exist. Six weeks later, Indel notified Subway it believed it had reached full compliance with the Supply Agreement. Subway disagreed, but instead of debating whether Indel had cured its deficient performance, Subway rested on its third, unassailable, reason for terminating the Supply Agreement: Indel's loss of approved supplier status. Indel mistakenly interprets Subway's decision to return to its quiver the two arrows of product noncomforance and late deliveries as Subway's admission that those grounds for terminating the Supply Agreement were baseless. A more accurate

and making all necessary capital improvements and yet still have been unable to deliver satisfactory products to Subway. Thus, according to Indel, the lost Settlement Agreement commissions for which L.A. Foods and the Food Connection sued Indel were not proven to be caused by Indel's lack of best efforts or necessary capital improvements.

We conclude Indel draws too narrow a distinction. Subway's main complaint about Indel's performance was leaky containers, permitting the reasonable inference that the leaks substantially contributed to Indel's losing its approved status. Indel knew about the leaks when it negotiated the Settlement Agreement. A cardinal principle of contract law is contractual language is interpreted under the circumstances within which the parties negotiated it. (Civ. Code, § 1647.) Thus, we must interpret the Settlement Agreement's "best efforts" and "necessary capital improvements" clauses in light of Indel's awareness of the leaks.

A second bedrock principle of contract interpretation is we must interpret Indel's promises to L.A. Foods and The Food Connection as Indel believed those companies understood its promises. (Civ. Code, § 1649.) Deandar testified he believed L.A. Foods and The Food Connection interpreted Indel's "best effort" promise as meaning Indel would do everything possible to fulfill its Supply Agreement with Subway. Combining Indel's knowledge of leaks, and Deandar's belief that L.A. Foods and The Food Connection understood him as promising Indel would do everything possible to perform under the Supply Agreement, we believe the most reasonable interpretation of the "best efforts" and "capital improvements" clauses is Indel would do everything possible to eliminate the leaks. And indeed, the "capital improvements" clause expressly obligates Indel to make any improvement needed to meet Subway's product specifications. It states: "Indel covenants and agrees that it shall make all capital improvements necessary to avoid termination of the Supply Agreement by IPC, including, without limitation, its

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reading of the record, however, is Subway did not need to, and did not want to, establish multiple grounds for termination when one was enough.

purchase or lease of the packaging equipment necessary to meet IPC's specifications." Thus, the trial court reasonably could have found that Indel's failure to end the leaks, or at the very least doing everything reasonably possible to do so, breached Indel's obligation to use its best efforts and make all necessary capital improvements.

The record contains ample evidence Indel did not do everything reasonably within its power to prevent leaks in glass jars. Indel's one significant capital improvement was buying a machine for a pilot program for plastic pouches, but these were not the type of containers Indel had been shipping to Subway. Its other (insignificant) capital improvement was retrieving from its warehouse and refurbishing a $800 capper in April 2000, but by then the previous season's product had already been packed and thus the capper did not stop leaks. Simple, inexpensive solutions were available to Indel: It could have turned the jars over to check for leaks, but did not do so. Or it could have bought a vacuum detector when it first started supplying Subway, which would have detected leaky jars with 100 percent reliability. Indel's failure to choose those latter options was substantial evidence it did not make its best efforts or make all necessary capital improvements to fulfill the Supply Agreement.

Covenants Sufficiently Definite

Indel contends the "best efforts" and "capital improvements" covenants are too vague to be enforceable. (See, e.g., Civ. Code, § 3390, subd. (5) [to be enforceable, contract must be definite, not vague or ambiguous].) The contention fails because California courts have repeatedly enforced precisely such language. (See, e.g., *Utility Cost Management v. Indian Wells Valley Water Dist.* (2001) 26 Cal.4th 1185, 1192 [discussing water utility's capital improvements]; *Morgan v. City of Chino* (2004) 115 Cal.App.4th 1192, 1200-1201 [discussing landlord's capital improvements]; *U.S. Ecology, Inc. v. State of California* (2001) 92 Cal.App.4th 113, 134-136 [question of fact whether party satisfied its promise to use its "best efforts" to achieve a particular result]; *Larkin v. Williams, Woolley, Cogswell, Nakazawa & Russell* (1999) 76 Cal.App.4th 227,

229-230 [breach of promise to use best efforts]; *County of Solano v. Vallejo Redevelopment Agency* (1999) 75 Cal.App.4th 1262, 1274-1275 [upholding capital improvements provision of contract].) Indel supports its argument that "best efforts" is too vague with authorities from other states that are not binding on us and which we decline to follow. Moreover, Indel does not cite even a single authority, let alone a California one, that "capital improvements" is too vague to be enforceable.

DISPOSITION

The judgment is affirmed. Respondents to recover their costs on appeal.

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RUBIN, J.

We concur:

COOPER, P.J.

FLIER, J.